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# George Joseph Bell's Inaugural Lecture

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## A. INTRODUCTION

- (1) Appointment to the Chair
- (2) The first or inaugural lecture
- (3) Content
- (4) Later courses of lectures
- (5) The transcription

## B. PROFESSOR BELL'S LECTURE

- (1) The study of law
- (2) Outline of the course
- (3) Materials of Scots law

## A. INTRODUCTION

### (1) Appointment to the Chair

On 3 January 1822 David Hume, the long-serving and distinguished Professor of Scots Law at Edinburgh University, was appointed to judicial office as a Baron of Exchequer.<sup>1</sup> Reacting swiftly to the news, and anticipating Hume's resignation from the Chair which was to take place on 14 January, a prominent member of the Bar wrote as follows:<sup>2</sup>

<sup>☆</sup> Professor of Scots Law, University of Edinburgh.

1 G C H Paton, "A biography of Baron Hume", in *Baron David Hume's Lectures 1786-1822*, ed G C H Paton, vol VI (Stair Society vol 19, 1958) 370-371. Hume took up his appointment on 15 January 1822, the day after his resignation from the Chair.

2 I am grateful to my colleague Dan Carr for discovering and transcribing this letter, which is held in the Library of the University of St Andrews as part of a volume of early nineteenth-century pamphlets and catalogued as G J Bell, *Application for the Chair of Scottish Law* (1822).

26, Hill Street, January 9, 1822

Sir,

On coming to town this afternoon, I learn that the Chair of the Professor of Scottish Law is likely to become vacant by the appointment of Mr Hume to the Court of Exchequer. And some of my friends, thinking of me I fear more favourably than I deserve, have urged me to put myself in nomination as a Candidate. The distinction of such an Office, conferred by the free voice of the Faculty of Advocates, I consider as one of the highest honours of the Profession; and my election to this Charge as one of the most important trusts which the Public has reposed in our body; But, encouraged as I have been by the kind partiality of my friends, and in the hope that, should the election fall on me, I may be enabled, by that free and unreserved intercourse which I have hitherto enjoyed with my Brethren, to supply, in the performance of the duty, some of those defects of which I am conscious, I beg to propose myself for your consideration as a Candidate.

I have the honour to be,

SIR,

Your most obedient and faithful Servant

The writer was George Joseph Bell and the undisclosed recipient may well have been the Dean of the Faculty of Advocates, Mathew Ross;<sup>3</sup> for, under the procedure laid down by statute a century earlier,<sup>4</sup> the appointment to the Chair of Scots Law was made by the Town Council of Edinburgh on the recommendation of the Faculty of Advocates.<sup>5</sup> If the recipient was indeed the Dean, the letter appears to have had the desired effect: it was the Dean who now proceeded to propose Bell for the Chair, seconded by Sir Walter Scott, and Bell's election by the Faculty was unanimous. Bell's qualifications for the position could indeed hardly be doubted. By now in his early 50s,<sup>6</sup> he had practised at the Bar for 30 years, given courses of lectures on conveyancing for the Society of Writers to the Signet,<sup>7</sup> and was the author of a widely admired work, the *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, currently in its third edition. As the *Caledonian Mercury* noted, Bell's appointment was regarded as merited "not only by his well known professional talents and learning, but by his eminent services as an institutional writer on some of the most important and difficult branches of our municipal law".<sup>8</sup>

3 On Mathew Ross, "a worthy innocent man .. but with not a particle of worldly knowledge", see Lord Cockburn, *Memorials of His Time* (1856) 405-407.

4 Edinburgh Beer Duties Act 1722 (9 Geo I c 14).

5 The Act required a leet of two names, but by this time the practice had developed of including as the second name a person whose position excluded him from appointment.

6 Bell was born on 26 March 1770.

7 From 1816 to 1818, in place of his deceased elder brother, Robert: see W M Gordon, "Bell, George Joseph (1770-1843)" *Oxford Dictionary of National Biography* (2004).

8 *Caledonian Mercury* 2 March 1822.

## (2) The first or inaugural lecture

Hume's final lecture to the class of Scots Law was delivered on 12 January 1822, three days before taking up his position as a Baron of Exchequer;<sup>9</sup> thereafter his lectures were read out by a fellow advocate, the future Lord Medwyn.<sup>10</sup> By the time that Bell's appointment was ratified by the Town Council, on 27 February, the session was nearing its end, and there was no need for him to assume lecturing duties until the autumn. In the intervening months Bell would have ample time to prepare his first course of lectures. This would comprise around 100 lectures, given daily from November to April between the hours of 3 and 4 pm.<sup>11</sup> Students ranged in age from 16 to 25, and in Bell's first year there were 257 of them.<sup>12</sup> There was no tradition of a special lecture to mark the new appointment, and Bell, like his predecessors, would inaugurate the Chair simply by giving the first lecture in his course. Nonetheless that lecture, given on Tuesday 12 November 1822, was evidently a special occasion. *The Scotsman* described the scene as follows:<sup>13</sup>

Our readers, we imagine, will all agree that the circumstance which at present is most deserving of notice under this head,<sup>14</sup> is the commencement, on Tuesday last, of a Course of Lectures on Scots Law by the learned Author of COMMENTARIES ON THE BANKRUPT LAW of SCOTLAND.<sup>15</sup> In the groups, or we might say crowds collected in the square of the University, we observed a good many strangers, with several of the most distinguished members of the Bar. Considerable anxiety was manifested on account of its being uncertain which class room was to be occupied; and when the room was fixed upon, it was instantly crowded, and many gentlemen found it impossible to gain admission, while others could hear but very imperfectly.

As for the lecture itself, the report said no more than this:

It obviously proceeded from a mind imbued deeply with the importance and dignity of the subject, and was distinguished no less by a classic elegance of manner, than a philosophic spirit. It gave an earnest, that in the future course, practical details would be rendered illustrative of principles; and that, while the students would be taught to know what the law actually was, they would also be furnished with the means of forming an opinion of what it ought to be.

9 Paton (n 1) 371.

10 John Hay Forbes, Lord Medwyn (1776-1854).

11 For Bell's lectures during the years in which he held the Chair of Scots Law (1822-43), see K G C Reid, "From text-book to book of authority: the *Principles* of George Joseph Bell" (2011) 15 EdinLR 6 at 14-19.

12 *Evidence Oral and Documentary taken and received by The Commissioners appointed by His Majesty George IV, July 23d, 1826; and re-appointed by His Majesty William IV, October 12th, 1830; for visiting the Universities of Scotland. Volume I: University of Edinburgh* (PP 1837 vol XXXV) (henceforth *Royal Commission Evidence*) 186, App 131.

13 *The Scotsman* 16 November 1822.

14 The head in question was "Law".

15 Perhaps an unfortunate manner of expressing the title of that distinguished work.

Hitherto, these brief and uninformative remarks were thought to be the only surviving evidence of the content of Bell's first lecture. Recently, however, a set of student notes has become available; formerly in private hands,<sup>16</sup> it has now been lodged in Edinburgh University Library. The notes, which cover all of Bell's first year as professor, beginning on 12 November 1822 and ending, rather suddenly, many months later with the words "Interrupted by the Circuit", are exceptionally clear and full. They occupy 211 pages of a bound folio volume under the heading *Notes on The Law of Scotland From the Lectures of Mr Bell, Edinburgh College, 1822-23*. The author is unknown. The neatness of the hand suggests that the notes were written up as a fair copy after each lecture.

Of course, student notes, even good ones, are not the same as Bell's actual text. Yet in the absence of a copy of that text—and none is known to have survived—they provide as reliable an account of Bell's words as is now likely to be found. Having regard to the difficulties of capturing all that was said by someone speaking at normal speed, it may be assumed that the notes do not form a complete record of Bell's inaugural lecture. Further, the student may have chosen to be selective in what he committed to paper. There will, therefore, be omissions in the notes, and perhaps significant ones. But in respect of those parts of the lecture which the student was able or chose to record, there is no reason to question the accuracy of what he wrote—a view which, as we will see, tends to be supported by comparison with notes taken by other students in later years.

### (3) Content

The introductory part of Bell's course of lectures occupies the first sixteen pages of the student's notes.<sup>17</sup> The length alone would indicate material which is more extensive than could possibly have been covered in Bell's initial lecture on 12 November;<sup>18</sup> and as the thirteenth page gives a date of 14 November,<sup>19</sup> it seems reasonable to suppose that the introduction was spread over two lectures or, if a lecture was also given on 13 November, over three. That being so it is not possible to know at what precise point the first, or inaugural, lecture finished. Nor, probably, does it matter very much, for it is evident from the thematic unity of the material that Bell viewed it as a single subject, regardless of the divisions imposed by the tyranny of the one-hour lecture. In that spirit there is reproduced below the notes taken on all of the introductory material.

16 The last of the private owners was Professor George Gretton, who donated the notes to Edinburgh University Library.

17 At the end of this Bell turns to his first substantive topic, which is obligations and contract.

18 The first page of the notes is headed "Edinburgh 12th Nov 1822".

19 For the possibility that this date should actually have been Friday 15 November, see n 57 below.

Bell's introductory material can be seen as comprising three distinct parts, indicated below by (editorial) headings. Bell begins with an account of the nature of law and of the means of studying it. Next he considers how a course of lectures might best be organised, and sets out an outline of the programme which he intends to follow. Finally, he describes the sources of law, written and unwritten, and examines the problems of authenticity in relation to early statutes and case reports.

A particular preoccupation is with the difficulty of devising a course suitable for "the different wants and the different degrees of proficiency in my hearers".<sup>20</sup> Later, in evidence given to the Royal Commission on the Universities of Scotland in 1826, Bell was to describe his students as follows:<sup>21</sup>

The class which I teach is a very peculiar one; it consists not only of young men, properly academical students, who are intended for the learned professions here in Edinburgh, but of men who, without intending to submit to academical discipline, come up from the country (some of them even considerably advanced in practice), and who attend for the information which they may expect to obtain from the lectures. They therefore do not consider themselves under academical control in the same way as, in the initiatory classes, the young men are; but they attend for their own advantage when they can, or when they find advantage in it; or neglect to attend when they find it inconvenient, or useless.

The solution proposed by Bell in his lecture was to "begin with an elementary view of the whole system of our law, examining its leading principles and maxims"; later he would "go over the same ground with a more practical view, in order to qualify you for real business".<sup>22</sup> In the event, Bell's inexperience led him to underestimate how long it would take to deliver the first of his proposed parts, and by the time that, on 18 March 1823, he turned to the second part there was less than a month of the course left to run. The result, as the student recorded in his notes, was a much truncated treatment:<sup>23</sup>

We have now gone over a long course of lectures, not precisely, as it will be readily observed, on the intended plan. Circumstances have led us a good deal into detail, and the consideration of practical questions, during the first view of our subject. The remainder is consequently much abridged.

The experiment of attempting a double treatment of topics does not seem to have been repeated in future years; certainly it had been abandoned by 1825-6, the next year for which we have evidence,<sup>24</sup> and it is absent from the text-book which

<sup>20</sup> See 350 below.

<sup>21</sup> *Royal Commission Evidence* (n 12) 187.

<sup>22</sup> See 350 below.

<sup>23</sup> Manuscript 204. The second part runs only from 204 to 211.

<sup>24</sup> *Notes on Bell's Lectures 1825-26*, by Thomas Lees (Edinburgh University Library).

Bell was soon to write for his students, the *Principles of the Law of Scotland*.<sup>25</sup> Like all good teachers, Bell had evidently adjusted his ideas to the realities of the class-room.

Much else in Bell's introductory material is of interest, not least because it considers topics which do not appear in any of his published works. In places he is evidently drawing from the opening title ("Of Laws in general") of Mackenzie's *Institutions* and Erskine's *Principles* and *Institute*, as might be expected;<sup>26</sup> elsewhere the material is more obviously original.

Law, in Bell's view, can be reduced to a few basic principles or elements "which by their combinations come to answer all the wants of man".<sup>27</sup> Partly for that reason, there is "great uniformity" between all systems of law, and especially between those systems of Europe, including Scotland, which are based on Roman law.<sup>28</sup> It is not possible to understand any part of law properly without understanding all law because law is "one system", and to restrict oneself to a single branch to the exclusion of the rest, as in England, is "apt certainly to cramp the mind".<sup>29</sup>

To these reflections on the nature of law and legal practice, Bell adds a candid survey of the Scottish legal library. Kames is "distinctly wrong" in his views on equity; Bankton's *Institute* is valuable mainly for its "fine index"; Erskine's *Institute* "is admirable for clearness of principle, and sound sense"; but it is Stair's *Institution* alone which is "a work of extraordinary perfection". Finally, and as befits a professor addressing his students for the first time, Bell offers advice as to the study of the law. This "requires so much exertion that I should advise those who are lukewarm at the outset to give it up"; yet, though "arduous", "if rightly prosecuted, [it] presents no difficulties which be otherwise than animating to the spirit of youth".<sup>30</sup> Lecture notes, Bell warns, "are but the materials of study: it remains for every one to make the knowledge his own in his own way".<sup>31</sup> The sources to be used are Scottish: English law "should serve merely for illustration" and is no "authority in matters of Scotch jurisprudence".<sup>32</sup> For the assiduous

25 First edition 1829, with further editions prepared by Bell in 1830, 1833 and 1839.

26 Sir George Mackenzie, *The Institutions of the Law of Scotland* (1684) 1.1; J Erskine, *Principles of the Law of Scotland* (1754) 1.1; J Erskine, *An Institute of the Law of Scotland* (1773) 1.1. Bell may also have made use of the equivalent section (1.1: "Common principles of law") in Viscount Stair's *Institutions of the Law of Scotland* 2nd edn (1693).

27 See 349 below.

28 See 349 below.

29 See 351 below.

30 See 348 below.

31 See 357 below.

32 See 351 and 357 below. This warning against English law, twice repeated, will surprise those who regard Bell as an Angliciser.

student, the rewards are no less than the mastery of a system of law “which, perhaps, more than any other in ancient or modern times, will be found to promote the prosperity, happiness, and freedom of the people”.<sup>33</sup>

#### (4) Later courses of lectures

Far from being written specially for an inaugural lecture, Bell's introductory material was evidently intended for use in the years to come. That view is borne out by the only two sets of student notes known to survive from those years, for 1825-26 and for 1836-7.<sup>34</sup>

By 1825-26, Bell's fourth year of lecturing, the preliminary material had expanded to fill no fewer than five lectures. The student's rather brief account of the first lecture has a distinctly familiar ring to it:<sup>35</sup>

Mr Bell, in his first lecture, noticed the importance of the subject about which we were to be engaged; stated the difficulties attending the study of it; recommended other branches of literature, such as ancient and modern history, metaphysics, etc as auxiliaries to the student; warned his students of the numerous and unforeseen difficulties that attended not only the study, but the practice of the law; pointed out the respective duties of the Professor and students; stated the nature of law; and laid down a general plan of his course.

In what seems to have been for the most part new material, the next three lectures “were employed to trace the history of ancient and modern jurisprudence—particularly that of Rome, France, England, and Scotland”, although there was also the familiar discussion of law and equity and of “what constituted the written and unwritten law of Scotland”.<sup>36</sup> The final introductory lecture reverted to the pattern of the first year by considering the sources of law.<sup>37</sup>

The other set of student notes, from 1836-7, is less full. Again the introductory material occupied the best part of five lectures and appears to have covered much the same ground as before. It is not possible to be certain about this, however, because the student missed the first and fourth lectures and gives only a sketchy account of the second and third, probably on the basis that the material did not

33 See 350 below: a suitably Whiggish sentiment.

34 *Notes on Bell's Lectures 1825-26* (n 24); *Notes on Bell's Lectures 1836-37*, by John Yule of Broughton Hall (Edinburgh University Library).

35 *Notes on Bell's Lectures 1825-26* (n 24) 1.

36 *Notes on Bell's Lectures 1825-26* (n 24) 1-2. We can only speculate as to the nature of this material because the student, with a typical instinct for what might and might not be practically useful to him, took almost no notes.

37 *Notes on Bell's Lectures 1825-26* (n 24) 2-5. It is only at this point that the student begins to take detailed notes. They conclude: “After treating of these preliminary matters, Mr Bell proceeds, in his subsequent lectures, to the consideration of the subject more immediately in view.”



sufficiently bear on legal practice.<sup>38</sup> Among the topics covered were: law and equity; the status of court decisions;<sup>39</sup> some rudimentary legal history; Acts of Parliament; the Scottish law library; and the difference between legal and moral obligation.

### **(5) The transcription**

In preparing the transcription which follows of the notes on Bell's inaugural lecture (or lectures), the original has been followed with only minor adjustments of punctuation and spelling. The headings are new but were suggested by the student's own headings. Some explanatory material is given in the footnotes.

## **B. PROFESSOR BELL'S LECTURE**

### **(1) The study of law**

You are now to enter on the study of that science which is to form the chief occupation of your future life, and no occasion seems so fit as the present, when you are at the threshold of your professional existence, for taking a review of your past studies, and forming the plan of those which are to follow. The pursuits of the classics, of science, and of elegant literature, must in time give way to the more exclusive study of every man's profession: yet let them be often recurred to.

The study of law is arduous; and yet, if rightly prosecuted, presents no difficulties which should be otherwise than animating to the spirit of youth. Many people are inclined to say that theory should be confined within the limits of the academic walls, and that the object of a lawyer should be to collect precedents and to store his note book with practical information. My views are different. I can conceive the case of the note book full, while the head is empty, and shall consider my duty as best fulfilled by assisting you to settle, by a few leading rules, the landmarks and finger posts which may serve to guide you through the mazes of law.

The high duty imposed on me, as representative of the Faculty,<sup>40</sup> is to form pupils worthy of their body: pupils who are one day to become the living depositaries of the law, the future judges and legislators of their country, and the intrepid defenders of her noble institutions. For this career it is my highest duty

38 That the note-taker was already a practising lawyer is indicated by the explanation given for missing the fourth lecture: "Absent, being term-day".

39 *Notes on Bell's Lectures 1836-37* (n 34) 1: "The Decisions of the Court of Session are not Law, but merely examples of the working of the Law."

40 I.e. of the Faculty of Advocates.

to prepare you, by directing you to the study of law in a liberal and comprehensive spirit.

The limits of moral philosophy and law are often sufficiently difficult to observe. In law every duty produces a counterpart, a right demandable in courts, to be enforced by the hand of authority, of which the breach is [a] crime, followed by punishment to prevent its repetition. In ethics there is no corresponding right.<sup>41</sup>

In explaining the principles of the Law of Nations I would avoid those speculative views in which many writers have indulged, in drawing their arguments from man in a savage state and following in imagination through all the stages of society. Law is rather to be viewed in the curious and beautiful results which the Creator has made to arise from a few leading principles, interwoven with the constitution of man: in all nations the most admirable effects can be deduced from a few elements which by their combinations come to answer all the wants of man. This may be traced in physics too.

In treating of jurisprudence, such general principles should form the basis of arrangement; and the support of this view is found in the great uniformity which exists fundamentally between all systems of law, from those of the Gentoos<sup>42</sup> to those of the northern Indian: in all we can trace the leading lines, not to [be] eradicated by any change of circumstances. Thus the principle of self-preservation may be recognised as the great fountain of criminal jurisprudence. Thus again in the love of property, the desire of possession natural to man, gives rise to the most beautiful arrangements of social order, and by its direct or sympathetic operation will be found a perennial spring of law which will continue to flow while man is a sociable being. Another great principle is the reliance of man on the faith of his fellows: hence arise all contracts; hence all combinations of the weak for the resistance of oppression.

It is our duty to examine how far the institutions of our country are in unison with the standard law of nature which can never err.

41 A decade later the distinction between moral and legal obligation was to become the subject of an extended example. See *Notes on Bell's Lectures 1836-37* (n 34) 3-4: "There is also a difference between legal and moral obligation. Let us suppose that a man has through misfortune become bankrupt, and is lying in jail, and that some person hearing of his destitute circumstances, sends him a banknote sufficient to pay his creditors, and procure his release. After a while this person in turn becomes bankrupt and is thrown into prison. Now is the time for the former bankrupt, whom we shall suppose in the meantime to have acquired wealth, to step forward and release his benefactor. But is he bound in law to do this? By no means – there is here a strong moral obligation but no legal one. On the other hand, if at the time the former was relieved from his difficulties, he granted a written promise to repeat the sum, then of course there is a legal obligation."

42 Today the normal meaning of "Gentoo" is a type of penguin, but in Bell's time it meant "a non-Muslim inhabitant of Hindustan; a Hindu; in South India, one speaking Telugu": see *Oxford English Dictionary* (online edition).

Lawyers of the higher order will not omit to investigate the jurisprudence of other nations. The similarity among the laws of all modern Europe may be traced to the civil or Roman institutions. In Scotland the adoption of that system has been even more explicit than elsewhere.

After the various revolutions through which our jurisprudence has passed—military, agricultural, and commercial from each of which it has received some colour or addition—there has resulted a system which, perhaps, more than any other in ancient or modern times, will be found to promote the prosperity, happiness, and freedom of the people.

## **(2) Outline of the course**

The whole subject of Scotch law is too extensive to be embraced in any single course. The consideration therefore of public law as relating to governors and the governed, and of criminal or penal jurisprudence, is for the present deferred.

The greater difficulty which presents itself in the management of this course arises from the different wants and the different degrees of proficiency in my hearers; and for this reason, it might perhaps have been better that there should be two distinct courses of Scotch law: one addressed to beginners, the other to those somewhat advanced in the study, and anxious to receive more practical instruction. As matters, however, stand this is out of the question and I have only to endeavour, by an arrangement now to be explained, to combine both objects in the same course.

It is my intention to begin with an elementary view of the whole system of our law, examining its leading principles and maxims, and the standard authorities and most important cases by which it is regulated. I shall then, in the second part of the course, proceed to go over the same ground with a more practical view, in order to qualify you for real business. It shall be my chief care that nothing shall be advanced in any part of the course, which shall not be intelligible to all in consequence of what has been said at an earlier period.

In executing this plan the difficulties I am prepared to find very considerable, and they are greatly heightened by the exalted criterion fixed by the eminent person who preceded me in this chair.<sup>43</sup>

<sup>43</sup> I.e. David Hume, who was Professor of Scots Law from 1786 until his appointment as a Baron of Exchequer in 1822. This presumably is the passage referred to in the report in *The Scotsman* (n 13) where Bell is said to have “not unbecomingly, exaggerated, in some degree, those [powers] of his predecessor”. The report continues with an attack on Hume’s Tory (and hence, in the newspaper’s view, illiberal) views: “It is not easy, we allow, to eulogize too highly the industry, caution, and sound judgment of Baron Hume; but we have never hesitated in avowing what has always painfully forced itself upon us, that his views of constitutional law, advocated in his COMMENTARIES ON CRIMINAL LAW under

Knowledge is the first requisite for a lawyer in order to secure him comfort, confidence and independence. Law has been called the noblest of all human sciences, and noble it certainly is: but the study is by no means seductive, and requires so much exertion that I should advise all those who are lukewarm at the outset to give it up. It has been said that the study of law is not calculated to open and liberalise the mind, but this remark is perhaps less applicable to the subject as treated in this country than elsewhere, at least than to the law of England; for in England, by the perfect division of labour, each lawyer applies to one branch only of law, a practice apt certainly to cramp the mind. With us it is different.

There are two difficulties, chiefly, which are apt to discourage the young lawyer, and I can speak on the subject from the recollection of my own feelings after coming to the bar.<sup>44</sup> The first is the consciousness of ineptitude in the midst of the overwhelming mass of law, with all its details, perplexities, and apparent contradictions. The second difficulty arises from the first: it is the fear of hidden and unknown niceties or distinctions. By the proposed plan of giving an elementary view of the subject in the first and a practical view in the second part of the course I do not despair of obviating most if not all of these obstacles.

Students in whatever stage of proficiency and of whatever destiny should now consider the law of Scotland as one system, for whatever branch is to claim their peculiar attention afterwards will be greatly assisted by a general knowledge of the whole subject.

It shall be my object to lecture rather than to compose as the author of a book: to repeat the same thing when deemed requisite and to explain my views by illustrations familiar or even colloquial. Nothing shall be advanced without an explanation.

The body of law is formed from many sources: it has been justly called the pride of human intellect and collected wisdom of ages. The law of Scotland is derived from Natural jurisprudence, Roman or Civil law, Feudal law, Canon law, mercantile and maritime policy. There has been too great a disposition of late to resort to the law of England as of authority, whereas it should serve as merely for illustration, and not always here with safety where the pure law of Scotland is concerned.

The following may serve as an outline of my plan in this course. Obligations or contracts shall be first handled: convention, the basis of all contracts; how a

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the influence of unhappy prejudices have, by means chiefly of the author's deserved reputation in other respects, inflicted a deeper injury on his country, than the publication of his *Lectures on the General Law of Scotland* could possibly do it good." For a standard Whig assessment of Hume's views on such matters, see Cockburn, *Memorials of His Time* (n 3) 163-164.

44 Bell was admitted as an advocate on 22 November 1791.

man may bind himself; the counterpart of an obligation; what law requires to complete a contract; *locus poenitentiae*; *rei interventus*; homologation; obligations conventional and obediential; joint and several; contract a mutual obligation; actions arising from contract.

Next comes the consideration of property: and first of moveable property; its constitution and transference; succession. Then of heritable property, which derives its character from the feudal system: view of rise and decline of this system; property in land, in relation to use and possession, and to the titles by which it is held; the use as relating to superior and vassal; the *dominium utile* or proprietor's right; restraints on this right; doctrine of nuisance; of servitudes; of leases, very particularly, for almost all the land in this country is in lease, and in lease which is established on a firm basis, so as to amount to a permanent estate in land; in relation to political economy. As to titles of property the feudal law has modified influence: it is an advantage that the subject of conveyance should fall entirely into the hands of professional men, so as to be unaffected by daily usages. Charter and seisin fall thus to be explained; then naturally follow the topics registration, progression, resignation, confirmation, conditions burdening possession, and the positive prescription.

Next comes succession in moveables and land; modified by the copartnery in marriage, marriage itself may be here considered: its dissolution, and consequent rights of terce and legitim; the rules of succession; primogeniture and equal right of succession; service; apparency; passive titles; last wills and donations *mortis causa*; natural and legitimate children; guardian and ward; actions consequent on the above relations.

In going over the same topics in the second part of the course, conventions will be handled in reference to practice: the jurisdiction of courts; their several principles; grounds of procedure; theory and practice of evidence; what authorities are looked up to; criticisms on their weight; boroughs; corporations; parishes; teinds and paupers; election laws; consistorial, mercantile, and maritime transactions. The combination of the formerly explained elements into practice shall be kept in view in this second stage, for no transaction exists without more or less complication. Among the last subjects which shall fall to be treated are the making up of titles, and rules of competition. Last of all shall be added general hints for the direction of legal studies.

### **(3) Materials of Scots law**

The law of Scotland, as of other countries, is divided into written and unwritten, otherwise called statutory and common law.

Our statutory law is contained in the statutes before, and the statutes since the Union. In the fifteenth, sixteenth and seventeenth centuries attempts were repeatedly made to save from destruction the remains of our early laws. The object held out in the various commissions from the time of James I to Mary was to discover what could be relied on as authentic and what adopted as of actual force among our ancient compilations. Skene,<sup>45</sup> Balfour<sup>46</sup> and Murray<sup>47</sup> successively turned their attention to the subject. Reprints were made of the *Regiam Majestatem*.<sup>48</sup> The long and keen controversy on the authenticity of that compilation seems to be concluded in a satisfactory manner by the views of one of the present commissioners Mr Thomson.<sup>49</sup> This gentleman supposes the *Regiam Majestatem* to have been an English compilation, made by order of Edward II, and imposed on his new subjects of Scotland as the substance of their ancient laws. The ideas of Mr Thomson communicated to me in 1805 have lately received a singular confirmation from a quarter unknown to the author: a copy of Glanvill's work<sup>50</sup> has been found at Berne in Switzerland in which certain border laws and references to the usages of Scotland are interjected into the interstices of the English compilation, presenting, on the whole, an exact model of our *Regiam Majestatem*.<sup>51</sup>

Our unwritten, common, or consuetudinary law is derived from the *ius naturae*, the Civil or Roman law, equity, Feudal law, and usage. The great difficulty here is to determine what is the evidence of the common law. Our guides in this matter are first the usages or decisions of court: decisions as it were the witnesses of common law. They are the grounds on which to determine future cases, from the presumption that in determining them the common law has been well investigated by the judges. Secondly, the authority of decided cases as rules to abide by. Yet the authority of precedents is not always conclusive: for the record by which alone we are acquainted with the former proceedings of

45 Sir John Skene of Curriehill (c 1540-1617).

46 Sir James Balfour of Pittendreich (c 1525-1583).

47 Sir Thomas Murray, Lord Glendoick (c 1633-1684/5).

48 See now *Regiam Majestatem*, ed and transl Lord Cooper (Stair Society vol 11, 1947).

49 Mis-spelt in the manuscript as "Thompson". Thomas Thomson was one of a talented circle of Whig advocates of which Bell himself was a prominent member. Appointed Deputy Clerk Register in 1806 he was responsible for editing and publishing the "Record" edition of the Acts of the Scottish Parliament. Later, like Bell himself, he became a principal clerk of session. See T Clarke, "Thomson, Thomas (1768-1852)" *Oxford Dictionary of National Biography* (2004).

50 *Tractatus de legibus et consuetudinibus regni Anglie*, traditionally attributed to Ranulf de Glanville (or Glanvill) (1120s?-1190).

51 The Berne manuscript, dating from around 1270, is the oldest manuscript to contain Scottish legal material: see [www.stairsociety.org/resources/manuscript/the\\_berne\\_manuscript](http://www.stairsociety.org/resources/manuscript/the_berne_manuscript). It was donated by the Berne Public Library in 1814 and is now held in the National Records of Scotland.

court are of very variable merit in point of accuracy and selection. At one time in Scotland reports were made by the highest authorities on the bench and then they could be looked to as the most legitimate oracles.<sup>52</sup> Durie and Stair, Dirleton and Gosford (and of those particularly Dirleton) are our highest authorities in this respect. Of the eighteenth century the principal reporters are Elchies, Kilkerran and Kames. Kilkerran's reports form perhaps the most admirable book of the sort in this or any country. Kames cannot thus be trusted as a lawyer; his reports are the most exceptionable part of his works. From the year 1752 down to the present time the decisions of court have been reported with various degrees of merit by members of the Faculty<sup>53</sup> appointed for the purpose.

Acts of Sederunt furnish another proof of the common law. These are of various sorts, but in general take the form of declaratory decisions, judicially ascertaining disputed points. The court here often exerts its powers of equity, in the establishment of rules for future cases. These powers should be exerted with extreme delicacy and caution.

Yet another ground of common law is recognised in the forms of deeds, proofs etc which may be considered as embodying the usages of the times, and as thus becoming evidence of the common law. Mackenzie in speaking of styles, says that they are to the lawyer as the chart to the geographer, the compass to the sailor. Sir William Blackstone, on this principle, calls the *registrum brevium* "the very foundation of the common law".<sup>54</sup>

As to statutes subsequent to the Union, the black letter edition is received and conclusive by 41 Geo 3 c 90 s 9.<sup>55</sup> An official publication of the statutes at large has been ordered. Thomson has besides published the Acts since the Union in fourteen volumes. In questions as to an Act reference should be always made to the fountain head without trusting a quotation or copy. It is a nice question how far usage can abolish an Act. In England to make a usage good it must have

52 For details of the collections referred to by Bell, see J S Leadbetter, "The printed law reports 1540-1935", in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 47-58.

53 I.e. Faculty of Advocates.

54 In fact the quotation is from a work by one of Blackstone's contemporaries and acquaintances, Daines Barrington (1727/8-1800): see Barrington's *Observations on the Statutes, chiefly the more ancient, from Magna Charta to the Twenty-first of James the First*, Ch. xxvii (1766) 78. The *Registrum Brevium* (Register of Writs) is the oldest book of English Common Law, containing the texts of the forms of writs accepted in the courts. The full quotation is: "It is likewise well known, that there is no legal argument which hath such force in our courts of law, as those which are drawn from the words of antient writs; and that the *Registrum Brevium* is looked upon to be the very foundation of the common law". I owe this reference to Martin Hogg.

55 The Crown Debts Act 1801 (41 Geo 3 c 90) s 9 provided that post-Union statutes "printed and published by the Printers duly authorized to print and publish the same by His Majesty, or by any of his Royal Predecessors, shall be received as conclusive Evidence" in all courts.

endured so that the memory of man runneth not to the contrary. When there is a dispute as to usage, arguments may be drawn from writs, forms, decisions and Acts of Sederunt.

A series *rerum judicatorum*<sup>56</sup> is not to be overruled by any appeal to reason, as was strongly exemplified today (14 Nov 1822) in a question as to the writer's privilege of retention.<sup>57</sup>

How far expediency may be pleaded in any case it is difficult to determine. It may be admitted when touching on a usage in the ordinary transaction of business, but not even then if against an established rule.

The doctrine of Equity is received very differently in England and in Scotland. See Blackstone<sup>58</sup> and Selden.<sup>59</sup> In England Common Law is separated from Equity; in Scotland the two are blended: our courts are courts of law and equity, our law a compound of common law, civil law, and equity. The Roman law, though never of authority, is an inexhaustible source of illustration. Kames<sup>60</sup> injudiciously separates law and equity and attempts to establish an opposition between them quite out of place with reference to Scotland where they go hand in hand. In England the principles of equity are as distinctly ascertained as any others, and do not vary with the mind of the Chancellor. Equity is declared to be the soul, spirit and essence of English law. Kames is distinctly wrong in his conceptions of the whole matter, and it does not appear that Blackstone had the proper impressions of the peculiar nature of equity.<sup>61</sup>

In the next place the works of our writers are received as evidence of the common law, in proportion to their merit. The elementary works are those of Mackenzie and of Erskine. The institutional works are four: those of Craig,<sup>62</sup> Stair,<sup>63</sup> McDouall,<sup>64</sup> and Erskine.<sup>65</sup>

<sup>56</sup> I.e. a course of decisions.

<sup>57</sup> *Campbell and Clason WS v Goldie* (1822) 2 S 16. Both *Session Cases* and *Faculty Collection* give the date as 15 November 1822, which suggests either that the student did not know the day of the week or that Bell (despite not being of counsel) had seen a copy of the Opinion in advance.

<sup>58</sup> Sir William Blackstone (1723-1780).

<sup>59</sup> John Selden (1584-1654).

<sup>60</sup> Henry Home, Lord Kames (1696-1782). The work Bell is referring to is *Principles of Equity* (1760, with further editions in 1767 and 1778).

<sup>61</sup> Reference is made to "Blackstone 3rd vol cap 27 towards the end", i.e. to W Blackstone, *Commentaries on the Laws of England* book III (1768) ch 27 ("Of Proceedings in the Courts of Equity").

<sup>62</sup> Thomas Craig (1538?-1608).

<sup>63</sup> James Dalrymple, Viscount Stair (1619-1695).

<sup>64</sup> Andrew McDouall, Lord Bankton (1685-1760). The manuscript has "McDowal".

<sup>65</sup> John Erskine of Carnock (1695-1768). Erskine was one of Bell's predecessors, having held the Chair of Scots Law from 1737 to 1765.



Craig's treatise on feudal law<sup>66</sup> has raised the character of our jurisprudence all over Europe. His views are perhaps too applicable to the continental rather than the Scotch system. Craig was born in 1547.<sup>67</sup> Mackenzie was born in 1636. His work<sup>68</sup> is short, clear, comprehensive and popular. Erskine's lesser work<sup>69</sup> is an extraordinary book. It is extraordinary as an unequalled combination of depth, conciseness, and clearness. It contains the most satisfactory adaptation of principles to real life and good sense.<sup>70</sup>

Stair and Erskine are our great institutional authors. Stair, a man of very high talent, flourished during the seventeenth century; served in the Covenanters' army; stood for the law professorship in "buff and scarlet";<sup>71</sup> was advocate in 1648, on the bench 1657, the President in 1671; when exiled in Holland prepared his collection of decisions 1671 to 1680; returned in 1688 and was restored to office; died in 1695. Stair's institute,<sup>72</sup> though sometimes savouring of the philosophy of the times, is a work of extraordinary perfection. It gives a view of the subject quite admirable compared with any other work on our law or perhaps on any law whatever. It is unrivalled for arrangement, clearness, deduction from principles, illustration and combination. What relates to Actions was added in the second edition of the work.<sup>73</sup>

Erskine's institute<sup>74</sup> is a posthumous work;<sup>75</sup> it had been his intention for some time to publish his lectures. The work, as it stands, is admirable for clearness of principle, and sound sense. In a few instances it betrays some degree of looseness, but in general its accuracy has been able to stand the test of contemporary abuse, and the work has become the one of all others most quoted.

66 *Jus Feudale*, written around 1600 and first published in 1655; an English translation of the 3rd edition, of 1732, was published by Lord Clyde in 1934.

67 In what is presumably just a slip of the pen, the manuscript gives the date as 1647. The actual year of Craig's birth is uncertain but may have been 1538, which is the date given in *Notes on Bell's Lectures* 1825-26 (n 24) 4.

68 *The Institutions of the Law of Scotland* (1684, and many later editions).

69 *Principles of the Law of Scotland* (1754, and many later editions).

70 "Although it appears dry, to a person commencing his studies": *Notes on Bell's Lectures* 1825-26 (n 24) 5.

71 This was not a "law professorship" but rather a position as regent at the University of Glasgow, which Stair held from 1641 to 1647. The reference to buff and scarlet (i.e. the uniform of an army officer) may derive from W Forbes, *A Journal of the Session* (1714) xxx: "he stood a Candidate in Buf and Scarlet, at a comparative Trial for a Chair of Philosophy then vacant there, to which he was preferred with great Applause."

72 *The Institutions of the Law of Scotland* (1681 with an enlarged 2nd edition, also by Stair, in 1693).

73 Published in 1693. Actions form the subject of Book IV.

74 *An Institute of the Law of Scotland* (1773, reprinted 2014 by the Edinburgh Legal Education Trust as *Old Studies in Scots Law* vol 5).

75 *Notes on Bell's Lectures* 1825-26 (n 24) 5: "The larger work is posthumous, and was therefore received at first with some degree of suspicion. It is now, however, perfectly established as an authority."

Bankton's institute<sup>76</sup> has a fine index but is not of high authority when compared with those of Stair and Erskine:<sup>77</sup> in the words of Mr Playfair as applied to a work of science, Bankton's book may be said to have "increased the surface rather than the solidity" of his subject.<sup>78</sup>

Let me warn you once again not to consider English law as an authority in matters of Scotch jurisprudence.

Notes of lectures are but the materials of study: it remains for every one to make the knowledge his own in his own way; I can only point out the direction.<sup>79</sup>

76 *An Institute of the Laws of Scotland in Civil Rights* (1751-1753, reprinted by the Stair Society, vols 41-43, 1993-5).

77 *Notes on Bell's Lectures 1825-26* (n 24) 5: "Bankton's work is not well digested, and is seldom consulted."

78 "Biographical account of the late James Hutton, MD FRS Edin", in *The Works of John Playfair, Esq* vol IV (1822) 31 at 34: "... Harris's Lexicon Technicum, the predecessor of those voluminous compilations which have since contributed so much more to extend the surface than to increase the solidity of science." The reference to what was then a new book shows what Bell must have been reading around the time of his lecture.

79 Bell returned to this theme in the preface to the first edition of his *Principles of the Law of Scotland* (1829): "be assured that no man can become a lawyer by hearing the prelections or lessons of another, without severe study; and that none ever yet became eminent in the Law, who was not his own teacher."